Caltex Oil Malaysia Ltd v PPMS Technologies Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D2–22–583 OF 2003
MARY LIM JC
26 JANUARY 2010

Contract — Goods sold and delivered — Claim for payment — Defence of undue influence raised by guarantor — Whether undue influence established — Whether promisee had proved claim on balance of probabilities

Contract — Undue influence — Elements of — Unequal position of parties — Relative position of parties to contract — Dominant influence, how assessed — Contracts Act 1950 s 16

Contract — Undue influence — Guarantee — Whether promisee had dominated free will of guarantors — Whether promisee had obtained unfair advantage — Whether one guarantor's dominant influence over another relevant factor in considering undue influence — Contracts Act 1950 s 16

The plaintiff sued the defendants to recover payment for goods sold and delivered to the first defendant. The second and third defendants were sued as guarantors. At the trial, the first defendant had been wound up and the claim against it was struck out. The second defendant had failed to attend court, personally or through counsel. The third defendant raised the defence of undue influence. He submitted that he had signed the guarantee because he was a director of the first defendant and that he was influenced by the second defendant to do so.

Held, dismissing the third defendant's defence and allowing the plaintiff's claim against the second and third defendants:

(1) For there to be undue influence, the unequal position of the parties must first be shown. It is the relative position of the parties to the contract upon which the claim is made that is relevant for consideration. The position of one of the parties with some other non-contracting party or between the parties on the same side is not

relevant (see para 6). *Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and other appeals* [1996] 2 MLJ 265 followed.

(2) It was dominance exerted by the plaintiff over the third defendant that came within the purview of s 16 of the Contracts Act 1950, not dominance by the second defendant over the third defendant. In any event, the evidence tendered did not suggest any dominance by the second defendant (see para 7).

(3) In a defence of undue influence, for the influence to vitiate the consent given, the influence must be colourable in that free will would not have been given, but for to give an unfair advantage to the recipient. In the instant case, there was no such advantage given to the second defendant or to the plaintiff. The third defendant had not discharged the burden of proof upon him. His defence thus failed (see para 7).

(4) On the facts, the plaintiff had proved its case on a balance of probabilities. The second and third defendants as guarantors were liable to pay on demand (see para 9).

[Bahasa Malaysia summary

Plaintif menyaman defendan-defendan untuk pembayaran bagi barang-barang yang dijual dan dihantar-serah kepada defendan pertama. Defendan-defendan kedua dan ketiga telah disaman sebagai penjamin-penjamin. Semasa perbicaraan, defendan pertama telah digulungkan dan tuntutan terhadapnya dibatalkan. Defendan kedua gagal menghadiri mahkamah, secara sendiri ataupun melalui peguam. Defendan ketiga menimbulkan pembelaan pengaruh tak wajar. Dia menghujah bahawa dia telah menandatangani jaminan tersebut kerana dia adalah seorang pengarah defendan pertama dan dia telah dipengaruhi oleh defendan kedua untuk berbuat demikian.

Diputuskan, menolak pembelaan defendan ketiga dan membenarkan tuntutan plaintif terhadap defendan-defendan kedua dan ketiga:

(1) Untuk wujud pengaruh tak wajar, kedudukan tidak sama pihak-pihak mesti terlebih dahulu ditunjukkan. Ia adalah kedudukan relatif pihak-pihak kepada kontrak di mana tuntutan dibuat yang relevan untuk pertimbangan. Kedudukan salah satu daripada pihak-pihak dengan pihak lain yang bukan pihak kepada kontrak atau antara pihak-pihak pada sebelah yang sama tidak relevan (lihat perenggan 6). *Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and other appeals* [1996] 2 MLJ 265 diikuti.

A (2) Ianya adalah penguasaan yang digunakan oleh plaintif ke atas defendan ketiga yang terangkum di dalam skop s 16 Akta Kontrak 1950, bukan penguasaan oleh defendan kedua ke atas defendan ketiga. Walau bagaimanapun, bukti yang dikemukakan tidak mencadangkan apa-apa penguasaan oleh defendan kedua (lihat perenggan 7).

B (3) Dalam pembelaan terhadap pengaruh tak wajar, untuk pengaruh mencacatkan kebenaran yang diberi, pengaruh tersebut mesti menunjukkan di mana kebebasan tidak mungkin akan diberi, kecuali untuk memberi kelebihan yang tidak adil kepada penerima. Dalam kes ini, tidak ada kelebihan sedemikian yang diberikan kepada defendan C kedua atau kepada plaintif. Defendan ketiga tidak melaksanakan beban pembuktian yang dikenakan ke atasnya. Oleh itu dia gagal dalam pembelaannya (lihat perenggan 7).

(4) Berdasarkan fakta-fakta, plaintif telah membuktikan kesnya atas D imbangan kebarangkalian. Defendan-defendan kedua dan ketiga sebagai penjamin-penjamin bertanggungjawab untuk membayar atas tuntutan (lihat perenggan 9).]

Notes

E For cases on claim for payment, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3911–3912.

For cases on guarantee, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5546–5547.

F For cases on undue influence in general, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5532–5564.

Cases referred to

Pernas Trading Sdn Bhd v Persatuan Peladang Bakti Melaka [1979] 2 MLJ 124, FC (refd)

G *Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and other appeals* [1996] 2 MLJ 265, CA (folld)

Legislation referred to

H Contracts Act 1950 s 16

Rules of the High Court 1980 O 35 r 1(2)

Roszimah bt Jamrus (Kam Woon Wah & Co) for the plaintiff.
Siti Sarah bt Husain (Ram Reza & Muhammad) for the third defendant.

I **Mary Lim JC:**

[1] The plaintiff supplied asphalt, diesel and lubes to the first defendant upon purchase requests by the first defendant. These goods were delivered to

various work sites identified by the first defendant. This claim arises from outstanding bills amounting to RM276,466.24 which despite demands, the first defendant has not settled. The second and third defendants are sued as guarantors pursuant to a letter of guarantee dated 15 May 2002.

[2] Before the matter came up for trial, the first defendant was wound-up on 27 September 2007. After filing proof of debt, the plaintiff withdrew the claim on the first day of trial and the claim was accordingly struck out against the first defendant. The second defendant though represented and his counsel duly informed as to the hearing dates, failed to attend either in person or through his counsel. Pursuant to O 35 r 1(2) of the Rules of the High Court 1980, the court proceeded with the trial in his absence.

[3] Several defences were canvassed on behalf of the third defendant, the principal defence being one of undue influence. The other defences on continuing liability of the second defendant, service of the letter of demand and deliveries to the subsidiaries of the first defendant were abandoned. This is what the third defendant has offered as evidence of undue influence. The third defendant claimed that he signed the letter of guarantee because he was a director of the first defendant and that he was influenced by the second defendant to do so. At Q & A nine of his witness statement, he explained this further — 'I was told by D2 that the offer from the Plaintiff was good for the Company and business. D2 had also said that if we are serious in our business, we have to sign the Letter of Guarantee, to show our commitment, thus being influence to the determination showed by D2, I signed the letter of guarantee, in hopes that this will be a smooth transaction and for the benefit of D1'.

[4] The law on undue influence is set out in s 16 of the Contracts Act 1950 and the leading authority here is *Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and other appeals* [1996] 2 MLJ 265. Section 16 of the Contracts Act 1950 states:

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> (1) A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.
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> (2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another —
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> (a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or

(b) where he makes a contract with a person whose mental capacity...

(3)

(a) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that the contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

[5] In *Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors and other appeals* the Court of Appeal was of the view that 'Undue influence, like all other equitable doctrines, is an extremely flexible concept. Subject to policy considerations, the categories in which it may operate are therefore not closed. For this reason, it is important to apply the doctrine, housed in s 16 of the Contracts Act 1950, to varying fact patterns in a flexible manner. This is done by interpreting s 16 in a broad and liberal fashion. Being a remedial provision — in the sense that it is designed to relieve obligations — it should, in our judgment, be given a liberal interpretation'. At p 311, the Court of Appeal recognised that 'The domination of the will of a person of which s 16 speaks may occur in a variety of fact patterns. It may occur even in commercial transactions. See *Lloyds Bank Ltd v Bundy* [1975] 1 QB 326 …'. With the guidance of the Court of Appeal's decision in *Tengku Abdullah Ibni Sultan Abu Bakar* and taking a liberal approach to the facts to see if the facts put forth by the third defendant amount to undue influence that may vitiate his free will of the third defendant such as to avoid the contract, I find myself not persuaded by the arguments of learned counsel for the third defendant.

[6] In my judgment, the case put forth by the third defendant fails on several counts. First of all, for there to be undue influence, the unequal position of the parties has first to be shown. And, it is the relative positions of the parties to the contract upon which the claim is made which is relevant for consideration. Not the position of one of the parties with some other non-contracting party or between the parties on the same side. What the third defendant has attempted to show are circumstances which in his mind amount to a position of dominance and thereby giving one party the opportunity to assert undue influence. He does this by comparing himself with the second defendant, the person who is said to have unduly influenced him to becoming a guarantor. According to the third defendant, the second defendant joined and was a director of the first defendant company long before the third defendant became a director. Further, the second defendant remained a director even after he, the third defendant had left the first defendant company. It was also the second defendant who conducted the

businesses of the first defendant company and who traded with the plaintiff. The third defendant did neither and this was confirmed by the plaintiff's witnesses.

[7] While this evidence may seem to suggest dominance, it is irrelevant. It is dominance exerted by the plaintiff over the third defendant that comes within the purview of s 16, not that by the second defendant over the third defendant. In any case, the evidence tendered does not suggest any dominance on the part of the second defendant. In fact, I see this as evidence of a person taking charge as a director should. More so, where there are only two directors as was the case with the first defendant company. From the third defendant's own evidence, the circumstances under which the third defendant agreed and signed the letter of guarantee are proof of that assessment. The third defendant has said it well, that he was 'influenced to the determination showed by D2'. This clearly means he was influenced or persuaded to do what was for the benefit of the first defendant company. Such influence is good in both business and common sense. But, in the context of a defence of undue influence, for that influence to vitiate the consent given, it has to be one that is colourable in that free will would not have been given but for to give an unfair advantage to the recipient. There is no such advantage here, be it to the second defendant or the plaintiff. In the circumstances, the burden of proof which lies with the third defendant who has made the charge in the first place has not been discharged. This defence must therefore fail.

[8] The plaintiff nevertheless bears the burden of proving its claim. From the evidence tendered I am satisfied that the goods ordered have been duly delivered to the first defendant (see *Pernas Trading Sdn Bhd v Persatuan Peladang Bakti Melaka* [1979] 2 MLJ 124). In the mode of doing business between the parties in this case, which is not challenged by the third defendant, any complaint including complaints of discrepancies between invoices and purchase orders have to be filed in written form to the complaints office of the plaintiff accompanied by a weighbridge report. The defendants have never filed any such complaints. As far as the accounts are concerned, satisfactory explanations accounting for the figures and the records have been given by the witnesses called by the plaintiff. Although these witnesses did not have personal knowledge of the transactions in that they may not have seen or met representatives of the first defendant, these witnesses, being persons in charge and in possession of the records are competent to give the evidence required. In any event, their competency was never seriously challenged and I accept their testimonies.

[9] With the accounts satisfactorily explained, I find that the plaintiff has proved its case on a balance of probabilities. The third defendant as well as

A the second defendant as guarantors are liable to pay on demand. In view of their failure to pay, these defendants are liable to the sum stipulated in the letter of guarantee, that is a sum of RM200,000.

B **[10]** I therefore allow the claim against the second and third defendants as set out in para 10(c) of the statement of claim together with interest at 4% from the date of filing of this action to the date of realisation. I further order a sum of RM20,000 as reasonable costs.

C *Third defendant's defence dismissed and plaintiff's claim against second and third defendants allowed.*

Reported by Andrew Christopher Simon

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